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No.

Supreme Court, U.S.
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In The
Supreme Court of the United States

MANUEL GUERRA,

Petitioner,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL OF FLORIDA, Bill McCollum,

Respondents.

On Petition for a Writ of Certiorari
to The United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE ELEVENTH CIRCUIT'S STANDARDS AND BURDENS OF PROOF APPLICABLE TO A CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN THE PLEA PROCESS, AS WELL AS ITS RULE THAT THE RIGHT TO COMPETENT PLEA BARGAIN ADVICE IS AT BEST A PRIVILEGE, ARE IN CONFLICT WITH THOSE OF THIS COURT AND OTHER CIRCUITS AND WERE IMPROPERLY APPLIED IN DENYING THE PETITIONER'S CLAIM WHERE HIS COUNSEL MISTAKENLY ADVISED HIM THAT HIS SENTENCING EXPOSURE WAS A TWENTY-YEAR PRISON TERM IF HE REJECTED THE PROSECUTION'S PLEA OFFER AND THE PETITIONER WAS CONVICTED AFTER TRIAL AND SENTENCED TO IMPRISONMENT FOR THIRTY-FIVE YEARS AFTER DECLINING THE PLEA OFFER IN RELIANCE UPON COUNSEL'S MISADVICE.

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OPINION BELOW

A copy of the unpublished decision of the United States Court of Appeals for the Eleventh Circuit, *Guerra v. United States*, No. 07-11413 (11th Cir. March 28, 2008) affirming the denial of the petitioner's 28 U.S.C. § 2254 habeas corpus petition by the United States District Court for the Southern District of Florida, is contained in the Appendix. (App. 1-6).

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was filed on March 28, 2008. (App. 1-6). On May 12, 2008, the court of appeals entered an order denying the petitioner's timely filed petition for rehearing. (App. 7-8). A timely filed application for extension of time for filing this petition for writ of certiorari was granted to October 9, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A.

Petitioner, a state prisoner in Florida, was found guilty of second degree murder following a jury trial.

(App. 2). Petitioner filed in the state trial court a motion seeking postconviction relief arguing that he was denied his Sixth Amendment right to effective assistance of counsel in the plea process in violation of the standards promulgated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Petitioner argued that the two pronged test of *Strickland* for ineffectiveness (deficient performance and prejudice) was met because (1) his trial attorney misinformed him that if he rejected the prosecution's plea offer of a 10-year prison term and was convicted after trial, he was facing a sentence of 20 years; and (2) relying upon counsel's misrepresentation, petitioner continued with the trial, was convicted, but was sentenced to more than 34 years in prison. *Id.*

The state trial judge conducted an evidentiary hearing upon petitioner's motion. (App. 19-39). Petitioner presented three witnesses: his lead trial attorney, Eric Feldman; co-counsel, Diane Ward; and himself. The State of Florida presented no witnesses and offered no evidence in rebuttal to petitioner's case. Mr. Feldman admitted his misadvice to the petitioner and corroborated the petitioner's testimony in all material respects. No contradictory testimony was offered by co-counsel.

Mr. Feldman explained that prior to trial, petitioner was amenable to a plea bargain. Indeed, petitioner directed him to inquire of the prosecution whether, if he pled guilty, a plea agreement could specify where the sentence would be served. However, no "firm offers" were made by the State (until the plea offer at issue was made during the trial) and therefore no agreement between the State and petitioner was reached. (App. 28-9, 31).

At trial, after the prosecution rested but before the defense commenced its case, the prosecutor approached

Mr. Feldman with a firm plea offer whereby petitioner would receive a prison sentence of 10 years in exchange for a plea of guilty to a reduced charge of manslaughter. (App. 22-4). The trial judge was informed of and approved the plea offer and ordered petitioner to reach a decision quickly as to whether the trial would continue. However, the judge did not participate in the plea process and was not in the courtroom when the plea offer discussion took place off the record between petitioner and his counsel. Neither the trial judge, prosecutor, or defense counsel ever advised petitioner of his sentencing exposure under the applicable state sentencing guidelines. (App.24-5).

Mr. Feldman testified that when he informed the petitioner of the plea offer, the petitioner "was torn, didn't know what to do." (App. 24). Petitioner asked Mr. Feldman: "[W]hat am I looking at if I continue with the trial?" (App. 24-5). Mr. Feldman testified: "I remember telling him twenty." (App.25). Mr. Feldman admitted at the postconviction hearing that he gave that answer of "twenty" even though he had *not* determined petitioner's sentencing exposure upon conviction for second degree murder. Nor did Mr. Feldman ever discuss with petitioner his sentencing guidelines exposure upon conviction. Mr. Feldman testified that he did not review a sentencing guidelines scoresheet with petitioner until after the trial, when a scoresheet prepared by the prosecutor was disclosed to the defense. (App. 25-6). Mr. Feldman opined that his mistaken answer influenced petitioner's decision to reject the 10-year sentence and continue with the trial. (App. 29-30).

On the day of sentencing, Mr. Feldman was surprised to see that the sentencing guidelines scoresheet prepared by the prosecutor calculated a sentence of 34 years. Mr. Feldman described

petitioner's reaction to that sentence as one of "shock." (App. 26-7). He recalled petitioner stating that he understood from Mr. Feldman that his sentencing exposure was no more than 20 years. (App. 27). Mr. Feldman testified that after the sentencing, petitioner was "obviously upset" and repeated that he had no idea that such a long sentence could be imposed upon him. (App. 27). Mr. Feldman specifically recalled petitioner stating to him that he would have accepted the 10-year plea offer had he known his sentencing exposure was more than 34 years. (App. 30). Mr. Feldman stated that he was fired by petitioner after the sentencing. (App. 27).

The testimony of co-counsel Ward was corroborative. Ms. Ward never prepared a sentencing scoresheet calculation in petitioner's case for two reasons. First, she did not know how. Second, she deemed Mr. Feldman responsible for that aspect of the petitioner's representation. Nor did she ever explain to petitioner his sentencing exposure. (App. 20-1). She stated that petitioner's reaction to the prosecutor's scoresheet calculation was one of a "high level of distress and surprise." (App. 22).

Petitioner's testimony was consistent with that of both trial counsel. Petitioner stated that upon being advised of the 10-year plea offer, he asked Mr. Feldman what sentence he was facing if found guilty after trial. Mr. Feldman answered that petitioner was facing 20 years. (App. 32). Petitioner understood from counsel's answer that the worst case scenario upon conviction after trial was a 20-year sentence. (App. 33). Petitioner did not know he was facing a 34-year sentence until the day of the sentencing. (App. 35-6). He proceeded with trial having relied upon Mr. Feldman's representation that the maximum sentence was 20 years. Petitioner testified that he would have

accepted the 10-year sentence had he known he was facing 34 years in prison regardless of his claim at trial of self-defense. (App. 33-4, 37).

Petitioner also confirmed Mr. Feldman's testimony that there were no firm plea offers prior to trial. Petitioner's understanding was that various plea proposals discussed prior to trial were never "on the table." (App. 33-4, 37-8). Petitioner confirmed that although plea agreements and counter-agreements were discussed, no agreement could be reached. (App. 33-4).

The state postconviction judge denied relief solely upon the following ground:

> With respect to Mr. Guerra's claim that the plea offer was improperly communicated to him because he was told that the most that he was facing was twenty years, I'm rejecting that claim. I find Mr. Guerra totally incredible. Once again, I find his testimony to be incredible. That motion is denied in its entirety.

(App. 39). The judge did not address the unrebutted testimony of the petitioner's trial attorneys.

Petitioner appealed his Sixth Amendment claim to the District Court of Appeal of Florida, Third District which affirmed without opinion, citing *Varela v. State*, 711 So. 2d 1343 (Fla.3d DCA 1998). See *Guerra v. State*, 924 So. 2d 944 (Fla.3d DCA 2006).

Petitioner filed a petition for writ of habeas corpus with the district court based upon his ineffective assistance of counsel claim. The district judge summarily denied the petition in a written order. (App. 8-18). The district judge found that petitioner failed to show prejudice under the second or prejudice *Strickland* prong, thereby rendering it unnecessary to

decide whether Mr. Feldman rendered deficient performance in violation of the first prong. (App. 16). The district judge interpreted the state postconviction judge's finding that petitioner was "totally incredible" to mean that petitioner was not credible when he testified that he would have accepted the 10-year plea offer had he known he was facing 34 years rather than only 20 years as misrepresented by his counsel. (App. 17). The district judge ruled that this credibility finding was not rebutted by clear and convincing evidence and therefore resulted in a failure of proof that petitioner suffered any prejudice from Mr. Feldman's misadvice. *Id.*

The petitioner appealed to the Eleventh Circuit. Reiterating its rule that "'[t]he right to competent plea bargain advice is at best a privilege that confers no benefit' because a defendant 'may make a wise decision' without assistance of counsel or a 'bad one despite superior advice from his lawyer,'" (App. 5-6) (quoting *Wofford v. Wainwright*, 748 F.2d 1505, 1508 (11th Cir.1984)), the Eleventh Circuit "proceed[ed] directly to the second step of the *Strickland* analysis" and affirmed on the following basis:

> There is no indication in the record, and certainly no clear and convincing evidence, that [petitioner] would not have accepted the 10-year offer absent trial counsel's advice concerning a 20-year sentence. Trial counsel did not testify that [petitioner] would have accepted the 10-year offer at any point in the proceedings. Rather, counsel described that [petitioner] had limited doubts regarding his defense and had rejected prior plea offers. On this

> record, [petitioner] has not shown that he would have pled guilty had counsel told him that he could receive at 34-year, as opposed to a 20-year, term.

(App. 6).

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit appears to be the only jurisdiction that holds, as it did in petitioner's case, that "'[t]he right to competent plea bargain advice is at best a privilege that confers no benefit' because a defendant 'may make a wise decision' without assistance of counsel or a 'bad one despite superior advice from his lawyer.'" (App. 5-6) (quoting *Wofford*, 748 F.2d at 1508)). The rule of the Eleventh Circuit is at odds with this Court's standards for assessing effective assistance of counsel in the plea process as well as the standards of the other circuits. Certiorari is requested to address and resolve this conflict.

There is also a conflict between the Eleventh Circuit and other circuits concerning a petitioner's burden under *Strickland* for obtaining relief based upon trial counsel's misadvice in the plea process. Here, petitioner's trial counsel admitted that he mistakenly informed the petitioner that he was facing a 20-year sentence if he rejected the State's 10-year plea offer and was found guilty by the jury. In reliance upon that misadvice, the petitioner continued with trial, was convicted, but received a 34-year sentence. Several circuits hold that although the prejudice prong of *Strickland* may not be satisfied based solely upon a petitioner's claim that he would have accepted a plea offer but for counsel's misadvice, the petitioner's burden of showing prejudice can be satisfied by

"objective evidence" such as testimony from trial counsel admitting the mistaken advice, or a substantial disparity between trial counsel's misrepresentation and the sentence actually imposed. Here, although the petitioner presented both types of objective evidence, the Eleventh Circuit nevertheless ruled that the petitioner's case lacked sufficient proof of prejudice. Certiorari is also requested to resolve this conflict among the circuits.

ARGUMENT

A. Petitioner's Sixth Amendment Claim

The petitioner's claim is a denial of the Sixth Amendment right to effective assistance of counsel that took place in the plea process when, during trial and in reliance upon his counsel's misadvice that he was only facing a 20-year sentence if convicted after trial, he rejected a plea offer of a 10-year term. The petitioner was found guilty and received a sentence of imprisonment for 34 years. At a postconviction hearing, petitioner's counsel admitted that he did not know the petitioner's sentencing exposure upon conviction and that his advice to the petitioner was wrong. Petitioner's counsel also testified that when he communicated the plea offer, the petitioner was "torn" between accepting the 10-year sentence and continuing with trial, thereby showing that the petitioner was amenable to accepting the plea offer. Counsel further testified that the petitioner relied upon the affirmative misadvice in deciding to reject the plea offer and continue with trial. Consistent with counsel's testimony, the petitioner testified that he would have

accepted the 10-year offer had he known he was actually facing imprisonment of 34 years upon conviction but that he relied upon counsel's misadvice in rejecting the offer. The State offered no evidence to dispute the testimony of counsel or the petitioner.

B. The Law of the Eleventh Circuit Regarding Effective Assistance of Counsel in the Plea Process

On appeal from the denial of his federal habeas corpus petition, the Eleventh Circuit affirmed. Unique to the Eleventh Circuit is its rule that "[t]he right to competent plea bargain advice is at best a privilege that confers no benefit' because a defendant 'may make a wise decision' without assistance of counsel or a 'bad one despite superior advice from his lawyer." *Wofford,* 748 F.2d at 1508. In rejecting the petitioner's Sixth Amendment claim, the Eleventh Circuit reiterated this rule and concluded that the petitioner failed to satisfy the prejudice prong of *Strickland* by not having shown that he would have pled guilty had he known he was facing 34 years in prison as opposed to a 20-year term. The ruling of the Eleventh Circuit is at odds with decisions of this Court as well as decisions of other circuit courts of appeals regarding the standards for determining ineffective assistance of counsel claims based upon misadvice by counsel in the plea process.

C. The Law of this Court and Other Circuits Regarding Effective Assistance of Counsel in the Plea Process

Generally, in order to establish ineffective assistance of counsel in violation of the Sixth Amendment, the defendant must satisfy the two elements of *Strickland.* First, the defendant must show

that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88, 104 S.Ct. at 2064. Second, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

There can be no doubt that there is a right to effective assistance of counsel in the plea process. After all, a defendant's decision whether to plead guilty or proceed to trial is a critical stage in a criminal proceeding for which he is entitled to counsel. See, *e.g.*, *Moran v. Burbine*, 475 U.S. 412, 431, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986) ("Sixth Amendment right to counsel ... attach[es] ... after the initiation of formal charges"). Accordingly, in *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), this Court held that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." Accord, *Wright v. Van Patten*, ___ U.S. ___, ___, 128 S.Ct. 743, 746, 169 L.Ed.2d 583 (2008). It necessarily follows that an ineffective assistance of counsel claim can be based upon the misadvice of counsel during the plea process. See *Bradshaw v. Stumpf*, 545 U.S. 175, 186, 125 S.Ct. 2398, 2408, 162 L.Ed.2d 143 (2005) (noting that the validity of a plea made upon the constitutionally defective advice of counsel is subject to attack).

In evaluating a claim of ineffective assistance of counsel in the plea process, "the first half of the *Strickland* test is nothing more than a restatement of the standard of attorney competence...." *Hill*, 474 U.S. at 59, 106 S.Ct. at 370. However, in order to satisfy the "prejudice" requirement, the defendant need only show that "there is a reasonable probability that, but for

counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59, 106 S.Ct. at 370. *See also Roe v. Flores-Ortega*, 528 U.S. 470, 485, 120 S.Ct. 1029, 1039, 145 L.Ed.2d 985 (2000) (reiterating prejudice test of *Hill* and applying similar test for prejudice to ineffectiveness of counsel claim for failure to file notice of appeal). This framework is also held to apply to claims that, but for counsel's misadvice, a defendant would have accepted a plea bargain and not have gone to trial. *See e.g., Magana v. Hofbrauer*, 263 F.3d 542, 547 (6th Cir.2001) (requiring that petitioner show deficient performance and that, but for counsel's advice, there was a reasonable probability he would have pled guilty); *United States v. Gordon*, 156 F.3d 376, 379-80 (2d Cir.1989) (recognizing ineffective assistance of counsel claim where counsel's misadvice regarding potential sentencing exposure caused defendant to reject plea offer).

D. The Conflict Warranting Certiorari Review

Contrary to the above-cited authorities, the Eleventh Circuit adheres to the view that the right to competent plea bargain advice is nothing more than a "privilege that confers no benefit because a defendant may make a wise decision without assistance of counsel or a bad one despite superior advice from his lawyer." The Eleventh Circuit is apparently alone in this view -- and this view is wrong because the right to effective assistance of counsel in the plea process is a Sixth Amendment guarantee. Additionally, the Eleventh Circuit unrealistically adheres to the reasoning that a defendant in the plea process is apt to "make a wise decision without assistance of counsel." As this and many other cases demonstrate, the ever-

increasing complexities of sentencing guidelines, scoresheets, and statutory schemes are resulting in numerous instances of counsel imparting to their clients incorrect assessments of sentencing exposure. Certiorari review of this important issue is respectfully requested.

E. The Circuit Conflict on "Objective Evidence"

Ordinarily, a petitioner's testimony, without more, that he would have accepted a plea offer but for counsel's misadvice, is insufficient to prove prejudice, for the obvious reason that any petitioner is likely to offer such testimony, whether true or not, in an attempt to reinstate a rejected plea bargain. *See e.g., Toro v. Fairman*, 940 F.2d 1065, 1066 (7th Cir1991) (defendant's statement that he would "have had to be insane not to accept the plea agreement" was self-serving and alone, insufficient to establish a reasonable probability that he would have accept the plea). Accordingly, several circuits hold that the petitioner's burden can be met through an additional showing of "objective evidence." For example, where the record shows a substantial disparity between a defendant's actual maximum sentencing exposure under applicable sentencing guidelines and the sentencing exposure incorrectly represented by defense counsel, the disparity is deemed sufficiently "objective" to establish a reasonable probability that the defendant would have accepted the plea offer. *See e.g., Riggs v. Fairman*, 399 F.3d 1179, 1183-84 (9th Cir.2005); *Griffin v. United States*, 330 F.3d 733, 737 (6th Cir.2003); *Mask v. McGinnis*, 233 F.3d 132, 142 (2d Cir.2000); *United States v. Day*, 969 F.2d 39 (3d Cir.1992).

Here, the petitioner's testimony was so corroborated

by the substantial disparities between the sentence under the plea offer (10 years), counsel's incorrect advice (that the petitioner was facing 20 years if convicted after trial) and the petitioner's actual sentence (34 years). However, the Eleventh Circuit declined to follow those circuits where such a disparity constitutes "objective evidence" that satisfies the prejudice component of *Strickland*.

Several courts of appeals hold that objective evidence is also supplied by the testimony of a defendant's trial counsel that corroborates the critical aspects of his client's testimony. In *Boria v. Keane*, 99 F.3d 492 (2d Cir.1996), the defendant substantiated his allegation of prejudicial ineffective assistance by the testimony of his counsel who "made clear" that he never discussed with his client the advisability of accepting or rejecting the plea offer. *Boria*, 99 F.3d at 495. Boria's trial counsel testified that he "never gave his client any advice or suggestion" as to how to deal with the plea bargain. *Id.* at 497-98. Similarly in *Day*, supra, the Third Circuit remanded for an evidentiary hearing noting that defense counsel's corroboration "might qualify as sufficient confirming evidence." 969 F.2d at 45.

In this case, the testimony of petitioner's counsel corroborated his client's testimony. Counsel acknowledged that he misadvised the petitioner that he was facing only 20 years, rather than 34, if convicted after trial. However, in conflict with those circuits in which such testimony satisfies the prejudice prong of *Strickland*, the Eleventh Circuit adhered to a different standard, finding that the petitioner did not meet the prejudice prong because his trial counsel failed to testify that the petitioner "would have accepted the 10-year offer at any point in the proceedings." (App. 6). Arguably, the Eleventh Circuit

is calling for testimony from counsel that constitutes inadmissible speculation as to what his client might have done. But even if this were the proper standard, it was satisfied when counsel testified that the petitioner was amendable to pretrial plea bargaining that never resulted in a firm offer and that when the first firm plea offer was made during trial, the petitioner did not respond with outright rejection but instead was "torn" between the 10-year offer and what he believed to be his exposure of 20 years. Such testimony supported the petitioner's testimony that he would not have been so "torn" and would have accepted the offer if he had been accurately advised that the risk was 34 years (particularly considering the petitioner was born in 1949 and was therefore 51 years of age at the time of the plea offer).

The Eleventh Circuit's analysis is also in conflict with the standards applied by the Seventh Circuit in a case similar to the petitioner's, *Julian v. Bartley*, 495 F.3d 487 (7th Cir.2007). In *Julian*, the defendant was improperly informed by his trial counsel that the maximum sentence he could receive would be 30, rather than 60 years in prison. The Seventh Circuit found that habeas corpus relief was appropriate and that the petitioner satisfied the prejudice prong of *Strickland* where he relied upon counsel's misadvice in rejecting the plea offer of 23 years. The court reasoned that Julian was faced with the choice of accepting the plea offer of 23 years, or gamble by going to trial where he might be exonerated or face up to 30 years in prison.

> Julian believed he was only risking seven additional years for a chance at acquittal (the difference between the twenty-three the prosecutor offered to recommend and the third to which he could be sentenced

> after trial). In actuality, Julian was risking thirty-seven years for the chance at acquittal (the difference between the twenty-three the prosecutor offered and the sixty years to which he could be sentenced after trial). To gamble with seven years for the slim chance of acquittal might be a reasonable calculus for some. It is hard to imagine, however, that any reasonable defendant would be willing to risk thirty-seven years for the remote chance of acquittal. After all, sixty years is a life sentence for any defendant, particularly one who, like Julian, was thirty-eight at the time of sentencing.

Julian, 495 F.3d at 499. Accordingly, the Seventh Circuit found that Julian presented more than his own self-serving allegation that he would have taken the plea but for counsel's misadvice. See also *United States v. Morris*, 470 F.3d 596 (6th Cir.2006) (counsel provided ineffective representation in violation of *Hill* and *Strickland* when she told defendant that federal prosecution would result in sentence between 60 and 68 months when actual range was 101 or 111). The identical reasoning and standards should have applied to the petitioner's case.

For the foregoing reasons, certiorari review is warranted to review the conflicting decision of the Eleventh Circuit.

F. The Additional Conflict Generated by the Eleventh Circuit's View of the Deficiency Component of *Strickland* in the Plea Process

Although the Eleventh Circuit decided the petitioner's case after stating that it would "proceed directly to the second step of the *Strickland* analysis," the court briefly addressed the first or deficient performance prong of *Strickland* in a footnote. The petitioner addresses that footnote for two reasons. First, it might be viewed as an alternative holding; and second, the analysis in the footnote generates conflict on important matters also worthy of resolution by this Court. In the footnote, the Eleventh Circuit found that the petitioner did not meet the first prong of *Strickland* for two reasons, the first being the following:

> We pause to note that on this record, Guerra's habeas petition fails at the first stop of *Strickland* since, contrary to Guerra's claim in this appeal, there is no indication that trial counsel affirmatively misinformed him that he faced a 20-year maximum sentence. Rather, counsel advised Guerra that he had a "winnable case" and was "looking at twenty years."

(App. 6, n.1).

Whether counsel advised the petitioner he "faced a 20-year maximum sentence" or that he "was looking at twenty years" makes no difference. Even if counsel was offering an opinion, that does not change the analysis. As the Seventh Circuit stated in *Julian*:

> [T]he [state] appellate court's conclusion that because [trial counsel] provided an

> opinion rather than a guarantee, he could not have provided ineffective assistance of counsel is a non-sequitur. *** What [counsel] told [petitioner] about a thirty-year sentence was clearly wrong and therefore objectively unreasonable. In fact one would be hard pressed to find a lawyer who guaranteed a client anything. Guarantees in the law are hard to come by, particularly in the topsy-turvy world of sentencing. Were we to constrain claims for ineffective assistance of counsel only to those who received guarantees from their lawyers, we surely would eviscerate the law regarding the right to effective assistance of counsel.

Julian, 495 F.3d at 495-96.

Here, petitioner was clearly asking, as any reasonable accused in his position would have, for legal advice that any reasonably competent counsel could provide, namely, what would happen if he rejected the plea offer and was found guilty after trial. Counsel's response was clearly and grossly incorrect. The Eleventh Circuit's treatment of counsel's misadvice squarely conflicts with the *Strickland* deficient performance standards in general and with *Julian* in particular.

The Eleventh Circuit's other reason for "pausing to note" that petitioner failed to meet the first step in *Strickland* was the following:

> Moreover, Guerra was previously advised that he faced a potential maximum sentence of life imprisonment, if convicted of second-degree murder.

(App. 6, n.1). The Eleventh Circuit was apparently referring to the petitioner's pretrial bond hearing and what the State of Florida contended took place there (although no record of the hearing was offered by the State). The State contended that the bond judge advised the petitioner of the statutory maximum penalty for the offense charged. Even assuming that the State's contention is accurate, the Eleventh Circuit's conclusion does not follow. A brief discussion of the law of Florida regarding pretrial bond hearings shows why.

In *State v. Arthur*, 390 So. 2d 717 (Fla.1980), the Supreme Court of Florida held that an accused charged with a capital or life imprisonment offense is entitled to a bond hearing (also known in Florida as an "*Arthur* hearing") and the setting of bond unless the proof is evident or the presumption of guilt great. The petitioner was charged with a life imprisonment offense and was therefore afforded a pretrial bond hearing wherein he was likely so advised. However, the petitioner was never facing a sentence of life imprisonment if convicted after trial. Rather, as petitioner's trial counsel correctly testified, the petitioner's sentencing exposure if convicted after trial would be determined not by the statutory maximum, but by the applicable state sentencing guidelines. Mr. Feldman correctly understood that petitioner was <u>not</u> facing either the death penalty or life imprisonment if found guilty by the jury. Rather, petitioner was facing a guidelines sentence of a term of years in prison. Thus, the Eleventh Circuit was clearly mistaken in equating petitioner's knowledge that he was afforded a pretrial bond hearing because his charged offense was statutorily classified as a life felony with a failure to show deficient performance of trial counsel when he

advised the petitioner that he was facing 20 years in prison if convicted after trial.

G. The State Appellate Court's Decision

The state appellate court rejected the petitioner's constitutional claim based solely upon that court's prior decision in *Varela*. Although the Eleventh Circuit did not review the decision of the state appellate court, an examination of *Varela* shows that the state court's resolution of the ineffective assistance of counsel claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States ..." and/or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." See 28 U.S.C. § 2254(d)(1), (2).

In *Varela*, prior to the start of jury selection, defendant Varela was offered a plea to a term of seven years. A plea discussion took place in open court and the trial judge participated. The judge informed Varela that the maximum sentence which could be imposed if he were convicted after trial would be life imprisonment. Varela asked the judge to undercut the prosecution's offer by a lesser prison term. The judge refused. Varela then asked for a one day continuance to think about the plea offer. The judge denied the request but allowed Varela to confer privately in the jury room with his counsel to discuss the plea offer. After the conference, Varela returned to the courtroom, declined the plea, continued with the trial, was convicted, and sentenced to 25 years in prison. Varela filed a postconviction motion claiming ineffective assistance of counsel.

At the evidentiary hearing, Varela testified that he had no recollection of either the trial judge or his counsel advising him of the possibility of a life sentence (in direct contradiction to the trial court's advisement of such during the plea discussion in open court). Varela also testified that his trial counsel opined that in the event of conviction, he would in all likelihood receive a ten-year sentence. In contrast, Varela's defense counsel testified that he had repeatedly told Varela of the possibility of an enhanced sentence of up to life imprisonment and merely indicated that Varela might likely receive a ten-year sentence if convicted. The trial judge denied the postconviction motion and Varela appealed.

On appeal, the reviewing court affirmed, finding in pertinent part that Varela "emphatically rejected the [state's offer] even *prior* to his counsel's expressed opinion that [the defendant] would probably receive a ten year sentence from the lower court upon conviction." *Id.* at 1345 (emphasis supplied).

The undisputed facts in the case at bar are materially different from the facts of *Varela*. Here, the petitioner's trial judge did NOT participate in the plea process (other than to approve the 10-year sentence). Nor did the trial judge here advise the petitioner of his sentencing exposure to 34 years in prison. (Neither did the prosecutor or defense counsel so inform the petitioner.) Additionally, the petitioner did not reject the plea offer until *after* he specifically asked trial counsel what sentence he was facing if convicted after trial and only *after* trial counsel affirmatively misrepresented the sentence as 20 years. Moreover, the petitioner specifically and detrimentally relied upon trial counsel's answer and would not have continued with the trial had he known he was facing 34 years in prison. These critical and undisputed facts clearly

distinguish *Varela*. Thus, habeas relief was warranted because the decision of the state reviewing court, relying solely upon *Varela,* necessarily "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." See 28 U.S.C. § 2254(d)(2).

H. Summation

This case involves important constitutional questions about the correct legal standards to be applied and the proof required to establish prejudice under this Court's decisions in *Strickland* and *Hill.* Additionally, in the other circuits that have addressed these questions at length and under similar facts, the testimony of the petitioner, along with that of his trial counsel, and consideration of the sentencing disparities, would have been sufficient to establish prejudice (as well as deficient performance). Certiorari review is respectfully requested for consideration and clarification of these important questions.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted

Respectfully submitted,

PAUL MORRIS
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Counsel for Petitioner

DATED: September, 2008

Supreme Court, U.S.
FILED

107

(2)

No. 08-425

SEP 26 2008

OFFICE OF THE CLERK

In The
Supreme Court of the United States

MANUEL GUERRA,

Petitioner,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL OF FLORIDA, Bill McCollum,

Respondents.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
for the Eleventh Circuit

APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-11413
Non-Argument Calendar

D.C. Docket No. 06-22022-CV-AJ

MANUEL GUERRA,

Petitioner-Appellant,

versus

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL OF FLORIDA
Bill McCollum,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(March 28, 2008)

Before CARNES, BARKETT and MARCUS, Circuit Judges.

PER CURIAM:

Manuel Guerra, a Florida prisoner serving a 34-year sentence for second-degree murder, appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. On appeal, Guerra argues that he received ineffective assistance of counsel when his trial attorney misinformed him that he faced a maximum sentence of 20 years, and he ultimately rejected a plea offer of a 10-year term. Guerra says that but for counsel's alleged error he would have accepted the offer. Therefore, Guerra asserts that the district court erred in its analysis of his ineffective-assistance claim under Strickland v. Washington, 466 U.S. 668 (1984). After thorough review of the record and careful consideration of the parties' briefs, we affirm the denial of habeas relief.

We review de novo a district court's denial of a habeas petition under 28 U.S.C. § 2254 and its factual findings for clear error. See Sims v. Singletary, 155 F.3d 1297, 1304 (11th Cir. 1998). Habeas petitions premised on ineffective assistance of counsel present "a mixed question of fact and law requiring application of legal principles to the historical facts of the case." Coulter v. Herring, 60 F.3d 1499, 1503 (11th Cir. 1995).

Under 28 U.S.C. § 2254(d), a federal court may not grant habeas relief on claims that were previously adjudicated in state court, unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . or resulted in a decision based on an unreasonable determination of the facts in light of the

evidence presented in the State court proceeding." "The 'contrary to' and 'unreasonable application' clauses of § 2254(d)(1) are separate bases for reviewing a state court's decisions." Putnam v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001). The Supreme Court has held that a state court decision is "contrary to" established law if: (1) the state arrives at a conclusion opposite to that reached by the Supreme Court on a question of law; or (2) a state court confronts facts "materially indistinguishable" from relevant Supreme Court precedent, but reaches an opposite result. Williams v. Taylor, 529 U.S. 362, 405 (2000). A state court decision is an "unreasonable application" of clearly established law if the state court unreasonably applies controlling law, or unreasonably extends, or fails to extend, a legal principle to a new context. Id. at 407.

For a state court's adjudication to be an unreasonable determination of the facts in light of the evidence presented, "[n]ot only must the factual determination have been unreasonable, but the state court's factual findings must be shown unreasonable by clear and convincing evidence." Callahan v. Campbell, 427 F.3d 897, 926 (11th Cir. 2005). Credibility determinations are factual findings and therefore "are presumed to be correct absent clear and convincing evidence to the contrary. Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) (internal citations omitted).

To make a successful claim of ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance with deficient; and (2) the deficient performance prejudiced his defense. Strickland, 466 U.S. at 687. If a defendant cannot meet one of Strickland's prongs, a court does not need to address the other prong. Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000).

In determining whether counsel gave adequate assistance, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. Counsel's performance is deficient only if it falls below the wide range of competence demanded of attorneys in criminal cases. Id. at 689. "The test for reasonableness is not whether counsel could have done something more or different; instead, we must consider whether the performance fell within the broad range of reasonable assistance at trial." Stewart v. Secretary, Dep't of Corr., 476 F.3d 1193, 1209 (11th Cir. 2007) (quotations omitted).

An attorney's "affirmative misrepresentation in response to a specific inquiry from the defendant may, however, under certain circumstances, constitute ineffective assistance of counsel." United States v. Campbell, 778 F.2d 764, 768-69 (11th Cir. 1985). The Supreme Court has acknowledged that an attorney has a duty to advise a defendant, who is considering a guilty plea, of the available options and possible sentencing consequences. Brady v. United States, 397 U.S. 742, 756 (1970); see also Beckham v. Wainwright, 639 F.2d 262, 267 (11th Cir. 1981) (holding counsel's misrepresentation that the defendant could only be sentenced to five years incarceration on withdrawals of his guilty plea fell "outside of the range of competence of attorneys in criminal cases") (internal quotations omitted); Finch v. Vaughn, 67 F.3d 909, 915-16 (11th Cir. 1995) (holding counsel's misrepresentation that the defendant's state sentence would be served concurrently with his federal sentence constituted erroneous advice and ineffective assistance of counsel). Also, we have recognized that counsel may owe a greater duty to a client who proceeds to trial than one

who decides to plead guilty. See Wofford v. Wainwright, 748 F.2d 1505, 1508 (11th Cir. 1984).

The Supreme Court has defined prejudice as a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. To establish prejudice, the petitioner must show more than that the error had "some conceivable effect on the outcome of the proceeding." Stewart, 476 F.3d at 1209 (quotation omitted). Rather, the petitioner must show that, without the erroneous actions of his counsel, the outcome of his case would have been different. Strickland, 446 U.S. at 694.

Where a defendant challenges a not-guilty plea based on ineffective assistance of counsel, he "must show that there is a reasonable probability that, but for counsel's errors, he would have pleaded guilty and would not have insisted on going to trial." Coulter, 60 F.3d at 1504 (quotation and alterations omitted). In Diaz v. United States, 930 F.2d 832, 835 (11th Cir. 1991), we held that the defendant, who had rejected the government's plea offer, failed to establish prejudice where he had cited "no evidence to indicate that prior to his conviction he expressed any desire to plead guilty." Id. at 835. We concluded that the defendant's "after the fact testimony concerning his desire to plead, without more, [was] insufficient to establish that but for counsel's alleged advice or inaction, he would have [pled guilty]." Id. (citing Johnson v. Duckworth), 793 F.2d 898, 902 n.3 (7th Cir. 1986)).

We have commented that "[t]he right to competent plea bargain advice is at best a privilege that confers no certain benefit" because a defendant "may make a wise decision" without assistance of counsel or a "bad one despite superior advice from his

lawyer." Wofford, 748 F.2d at 1508. Further, plea considerations "frequently present imponderable questions for which there are no certain answers." Id.

In the instant case, we proceed directly to the second step of the Strickland analysis, since at that step it is clear that habeas relief properly was denied, given Guerra's failure to demonstrate that he suffered prejudice from the alleged deficiency.[1] There is no indication in the record, and certainly no clear and convincing evidence, that Guerra would not have accepted the 10-year offer absent trial counsel's advice concerning a 20-year sentence. Trial counsel did not testify that Guerra would have accepted the 10-year offer at any point in the proceedings. Rather, counsel described that Guerra had limited doubts regarding his defense and had rejected prior offers. On this record, Guerra has not shown that he would have pled guilty had counsel told him that he could receive a 34-year, as opposed to a 20-year, term. Accordingly, the district court properly denied Guerra's habeas petition after finding that the state habeas court's decision was not contrary to or an unreasonable applicable of federal law (Strickland) and that the decision was not an unreasonable determination of the facts in light of the evidence presented. Accordingly, we affirm.

AFFIRMED.

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[1] We pause to note that on this record, Guerra's habeas petition fails at the first step of Strickland since, contrary to Guerra's claim in this appeal, there is no indication that trial counsel affirmatively misinformed him that he faced A 20-year maximum sentence. Rather, counsel advised Guerra that he had a "winnable case" and was "looking at twenty years." Moreover, Guerra was previously advised that he faced a potential maximum sentence of life imprisonment, if convicted of second-degree murder.

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-11413

MANUEL GUERRA,

Petitioner-Appellant,

versus

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL OF FLORIDA
Bill McCollum,

Respondents-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

Before CARNES, BARKETT and MARCUS, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 06-22022-CIV-JORDAN

MANUEL GUERRA,	)
	)
Petitioner	)
	)
vs.	)
	)
JAMES R. MCDONOUGH	)
	)
Respondent	)

ORDER DENYING HABEAS CORPUS PETITION

For the reasons which follow, Manuel Guerra's petition for a writ of habeas corpus is DENIED, and this case is CLOSED.

FACTS[2]

In 1999, Mr. Guerra was charged with second-degree murder in state court. He was represented on that charge by Eric Feldman, Esq., who had been his lawyer on prior criminal matters going back to the 1980s. At a bond hearing, Mr. Guerra was correctly advised (and learned) that he faced a statutory maximum term of life imprisonment if convicted. Mr. Feldman also advised Mr. Guerra that he was facing a statutory maximum term of life imprisonment for second-degree murder.

As the case neared trial, Mr. Feldman asked Dianne Ward, Esq. (Now Judge Ward) to assist him.[3] Ms. Ward was not involved with any of the discovery and did not take any depositions. Ms. Ward did not calculate what sort of a sentence Mr. Guerra might receive if convicted, and she did not know what the sentence guidelines provided. She therefore never explained to Mr. Guerra what his sentencing exposure was. For his part, Mr. Feldman looked into Mr. Guerra's sentencing exposure, but never prepared a guidelines calculation for second-degree murder. Instead, he determined that Mr. Guerra would be sentenced to 17-18 years *if* he were convicted of the lesser-included offense of manslaughter. He did not,

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[2] The facts are taken from the state court record, including the testimony at the Rule 3.850 evidentiary hearing.

[3] To eliminate any possible confusion concerning her role in this case, I will refer to Judge Ward as Ms. Ward.

however, tell Mr. Guerra abut his estimate of prison time on a manslaughter conviction. Nor did he advise Mr. Guerra about a possible guidelines sentence for second-degree murder.

Mr. Feldman and Ms. Ward prepared for trial on a hybrid theory of excusable homicide/self-defense. Mr. Guerra's contention was that the victim had been the aggressor and had even tried to rob him with a firearm.

Mr. Feldman handled all plea negotiations and/or discussions. Mr. Guerra was amendable to a plea, but only under certain circumstances. In light of his medical condition, he did not want to go to state prison, and wanted to serve any sentence at the Dade County Jail so that he could be near Jackson Memorial Hospital for medical attention. Without making a firm offer, the prosecution asked Mr. Feldman to see if Mr. Guerra would accept a plea of 5 years in state prison followed by 5 or 10 years of probation, or a plea of 7 years in state prison. Mr. Guerra, who felt he had a strong case, did not tell Mr. Feldman to accept either of these offers or to tell the prosecution that he was interested in the offers. Instead, Mr. Guerra asked Mr. Feldman to make a counteroffer of "local time" (i.e. serving any sentence in Miami).

Trial was held in June of 2000. The morning after the state rested its case, and while the trial judge, Judge Pedro Echarte, was handling his calendar, one of the prosecutors offered Mr. Feldman a plea of 10 years in state prison for Mr. Guerra. A 10-year sentence was the minimum that Judge Echarte had said he would accept.

In what everyone described as a high-pressure moment, Mr. Feldman advised Mr. Guerra of the plea offer, and told him he had to decide quickly. Mr. Guerra was "torn," and asked Mr. Feldman, "What am

I looking at if I continue with the trial?" Mr. Feldman responded "20" or "probably 20" or "the judge will give you 20" or "you 're looking at 20 years."[4] In Mr. Feldman's opinion, Mr. Guerra was asking for an estimation of what he could get based upon how the case was going, and Mr. Feldman's answer was therefore about exposure under the guidelines.[5] Mr. Feldman never advised Mr. Guerra to turn down the plea offer

Mr. Guerra rejected the plea offer, and the jury later found him guilty of second-degree murder. The sentencing guidelines scoresheet later prepared for Mr. Guerra gave him 356 total sentence points (based upon the second-degree murder conviction and prior convictions), leading to a recommended sentence of 328 months in state prison. The score sheet also provided that, as allowed by Florida law, the sentencing judge could increase or decrease the 328-month recommended sentence by 25%. A reduction of 25% would lead to a sentence of 246 months (or 20.5 years), while an increase of 25% would lead to a sentence of 410 months (or 34.16 years).[6] Mr. Feldman and Ms.

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[4] Mr. Feldman came up with the 20-year figure based on the calculations he had done earlier for a manslaughter conviction, but did not advise Mr. Guerra of that fact.

[5] In his verified Rule 3.850 petition, Mr. Guerra stated that Mr. Feldman "told him that the greatest sentence he would receive, if convicted, was 20 years, the bottom of the guidelines."

[6] In Florida, the recommended sentence, as determined by the total sentence points, is assumed to be appropriate for the offender in question, but the judge has discretion to deviate up or down from the recommended sentence by 25% without having to explain his reasons. *See* Fla. Stat. §§ 921.0014(2); 921.0016(1)(a)-(b); *State v. Anderson*, 905 So.2d 111, 115 (Fla. 2005).

Ward, neither of whom had tried to figure out a possible sentence for second-degree murder, were surprised at the possibility of a 34-year sentence as reflected in the score sheet.

Judge Echarte sentenced Mr. Guerra to 34.16 years in state prison. According to Mr. Feldman, Mr. Guerra told him after the sentencing hearing that he would have taken the 10-year plea if he knew he was facing a 34 years in prison upon conviction. Mr. Guerra sought post-conviction relief in state court pursuant to rule 3.850 of the Florida Rules of Criminal Procedure. He alleged, in part, that he had received ineffective assistance of counsel because Mr. Feldman had incorrectly advised him about his sentencing exposure, and because he would have accepted the 10-year plea if he had known he was facing a 34-year sentence for second-degree murder.

At the Rule 3.850 hearing, Mr. Guerra testified that Mr. Feldman told him all along that he had a "winnable" case. When the 10-year plea offer was made, Mr. Guerra said he asked Mr. Feldman what he was facing if he was found guilty, and Mr. Feldman responded, "You're looking at 20 years." As a result, he did not give serious consideration to the plea offer. Mr. Guerra also testified that he had never actually rejected the earlier plea offers from the prosecution because they were not firm offers. Mr. Guerra further testified that he would have never exposed himself to a sentence of 34 years in the state prison system and would have accepted the 10-year plea. He would have gambled (by going to trial) on a 20-year sentence, but not a 34-year sentence.

Judge Echarte, who also presided over the Rule 3.850 hearing, denied relief on Mr. Guerra's ineffectiveness claim. He specifically fond that Mr.

Guerra was "totally incredible," but did not further elaborate on his reasons for denying the claim.

Mr. Guerra appealed Judge Echarte's ruling. The Third District affirmed in a per curiam order, citing *Varela v. State*, 711 So.2d 1343 (Fla. 3d DCA 1998).

In his federal habeas corpus petition, Mr. Guerra contends that he was denied effective assistance of counsel, resulting in a violation of the Sixth Amendment. First, he argues that Mr. Feldman's performance was deficient because he did not perform any guideline calculations for second-degree murder and incorrectly advised him that he was looking at 20 years if convicted. Second, he asserts that there is a reasonably probability that he would have accepted the 10-year plea offer if he had known his actual sentencing exposure.

APPLICABLE STANDARDS

Mr. Guerra's habeas corpus petition is governed by AEDPA. Under AEDPA, if a claim was adjudicated on the merits in state court, habeas corpus relief can only be granted if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(1)-(2). This is an "exacting standard.: *Maharaj v. Secretary, Dept. of Corrections*, 432 F.2d 1292, 1308 (11th Cir. 2005).

Under § 2254(d)(1), a state court decision is "contrary to " Supreme Court precedent if it "arrives at a conclusion different to that reached by [the Supreme]

Court on a question of law" or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at [an] [opposite] result." *Williams v. Taylor*, 529 U.S. 362, 405 (2000) (opinion of O'Connor, J., for majority). In other words, the "contrary to" prong means that "the state court's decision must be substantially different from the relevant precedent of [the Supreme] Court." *Id.*

With respect to the "unreasonable application" prong of § 2254(d)(1), which applies when a state court identifies the correct legal principle but purportedly applies it improperly to the facts before it, a federal habeas court "should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* At 409. *See also Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003). An "objectively unreasonable application of federal law is different from an incorrect application of federal law." *Woodford v. Visciotti*, 527 U.S. 19, 24-25 (2002). An "unreasonable application" can also occur if a state court "unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context." *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001).

As noted above, § 2254(d)(2) provides an alternative avenue for relief. Habeas relief may be granted if the state court's determination of the facts was unreasonable. "A state court's determination of the facts, however, is entitled to a deference" under § 2254(e)(1). *Maharaj*, 432 F.3d at 1309. This means that findings of fact by a state court are presumed to be correct, and a habeas petitioner must rebut that presumption by clear and convincing evidence. *See Hunter v. Secretary, Dept. of Corrections*, 395 F.3d 1196, 1200 (11th Cir. 2005).

Finally, where a federal court would "deny relief under a de novo review standard, relief must be denied under the much narrower AEDPA standard." *Jefferson v. Fountain*, 382 F.3d 1286, 1295 n.5 (11th Cir. 2004).

DISCUSSION

To succeed on his ineffectiveness claim, Mr. Guerra must demonstrate that Mr. Feldman's performance was constitutionally deficient and that he suffered prejudice. *See generally Strickland v. Washington*, 466 U.S. 668, 687 (1984). Where a defendant contends that his counsel's deficient advice or performance led him to plead guilty, he must show that there is a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Federal courts, including the Eleventh Circuit, have used this same general standard in evaluating ineffectiveness claims by habeas petitioners who - in contrast to the petitioner in *Hill* - contend that they turned down a plea offer and insisted on going to trial as a result of deficient advice by counsel with respect to sentencing exposure. In such cases, the petitioner must show that there is a reasonable probability that, but for counsel's deficient performance, he would have accepted a guilty plea offer resulting in less prison time. *See, e.g., Coulter v. Herring*, 60 F.3d 149, 1504 & n.7 (11th Cir. 1995). As explained below, on this record Mr. Guerra is not entitled to habeas relief. The state court's denial of relief to Mr. Guerra was not contrary to, or an unreasonable application of, *Strickland* or *Hill*. And Judge Echarte's factual findings - that Mr. Guerra would not have accepted the 10-year plea if he knew he

was facing 34 years for second-degree murder - was not unreasonable.

It is not absolutely clear that Mr. Feldman - despite his inexcusable failure to determine prior to trial the worst sentence Mr. Guerra might receive if convicted of second-degree murder - rendered constitutionally deficient performance. Mr. Guerra asked Mr. Feldman what he was looking at convicted of second-degree murder by the jury, not what his maximum exposure was under the guidelines. Mr. Guerra already knew his maximum statutory exposure was life, and he wanted to know what Mr. Feldman thought he could get if found guilty. Mr. Feldman told Mr. Guerra he was facing 20 years, and 20 years was a permissible guideline sentence if Judge Echarte decided (as permitted by Florida law) to deviate down 25% from the recommended sentence of 328 months. In other words, Mr. Feldman's answer to Mr. Guerra's question was, fortuitously, not utterly incorrect. It is unnecessary to decide whether Mr. Feldman rendered deficient performance, however, for on this record and even under a novo standard Mr. Guerra has failed to show the necessary prejudice, and without such a showing, he is not entitled to habeas relief.

As noted earlier, Judge Echarte - who had also presided at Mr. Guerra's trial - found at the conclusion of the evidentiary hearing that Mr. Guerra was not credible. In light of that find, which has not been rebutted by clear and convincing evidence, *see* § 2254(e)(1), Mr. Guerra has failed to show prejudice resulting from Mr. Feldman's advice. The *Hill* prejudice inquiry comes down to what the defendant likely would have done if given proper advice, coached of course in "reasonable probability" terms. The defendant's credibility is therefore critical. *See e.g. Cullen v. United States*, 194 F.3d 401, 408 (2nd Cir.

1999). ("In determining whether Cullen has shown a reasonable probability he would have accepted the plea bargain if he had been informed of its terms, the fact-finder will primarily have to make a determination of Cullen's credibility."). Here, Judge Echarte simply did not believe Mr. Guerra when he testified that he would have accepted a 10-year plea had he known he could be sentenced to 34 years in state prison. Judge Echarte's credibility finding is amply supported by the record. Mr. Guerra had maintained his innocense (though that is not, of course, dispositive); he thought he had a winnable case; and he had not accepted (or been receptive to) informal offers involving even less time in state prison (i.e., the offers of 5 years in state prison followed by 5 or 10 years probation, and of 7 years in state prison). *See Cook v. United States*, 2006 WL 1995742, *4 (11th Cir. 2006); *Diaz v. United States*, 930 F,2d 832 (11th Cir. 1991).

Mr. Guerra points to the purported substantial disparity of 14 years between Mr. Feldman's advice (20 years) and the sentence Judge Echarte actually imposed (34 years) as objective evidence establishing a reasonable probability that, but for the incorrect advice, he would have accepted the 10-year plea offer. Even assuming a substantial disparity existed, such evidence does not demonstrate prejudice here. A substantial disparity is a factor that courts take into account *in addition* to a defendant's testimony that he would have accepted the plea offer; it is not, by itself, sufficient when the defendant's testimony as to the acceptance of the plea has been rejected by the trier of fact. *See, e.g., United States v. Gordon*, 156 F.3d 376, 381 (2nd Cir. 1998). ("We agree that [a great] disparity provides sufficient evidence – *when combined with a petitioner's statement concerning his intentions* – to support a finding of prejudice under *Strickland*").

(emphasis added). To the extent that the Sixth Circuit holds that a substantial disparity is enough to establish a reasonable probability that the plea offer would have been accepted, *see United States v. Morris*, 470 F.3d 596, 602-03 (6th Cir. 2006) (citing cases), I do not find its reasoning persuasive, at least not where a defendant's testimony about his intentions has been rejected as incredible by the trier of fact.

Mr. Guerra notes that an attorney is not likely to admit that he rendered deficient performance given all the possible negative repercussions of such an admission. That is generally true, *see, e.g., United States v. Day*, 963 D,3d 39m 46 n,9 (3rd Cir. 1992), but Mr. Feldman's admission can only support the first *Strickland* prong. Mr. Feldman cannot testify as to what Mr. Guerra would have done had he been given different advice about his sentencing exposure. In other words, Mr. Feldman's admission does not help Mr. Guerra on the prejudice prong given Judge Echarte's adverse credibility finding.

CONCLUSION

Mr. Guerra is not entitled to habeas corpus relief. The petition is DENIED, and this case is CLOSED.

DONE and ORDERED in Chambers at Miami, Florida, this 12th day of March, 2007.

Adalberto Jordan
United States District Judge

Copies to counsel of record

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. F98-101114

STATE OF FLORIDA,

Plaintiff,

v.

MANUEL GUERRA,

Defendant.

_____/

Richard E. Gerstein Building
1351 Northwest 12th Street
Miami, Florida 33125

The above-titled cause came on for hearing before the Honorable Judge PEDRO P. ECHARTE, JR., Circuit Court Judge, held on October 8, 2004.

EXCERPTS

case, do you know about how long that was?

A. I really don't. I'm going to say no more than three months is my guess, but I'm not certain.

Q. Okay?

A. It was a very small case to prepare because, I mean, it wasn't like there were hundreds of witnesses and boxes of documents to read. It was less than a dozen witnesses so it didn't require a great deal of time.

Q. Do you know when you received B did you receive some kind of a file when you got in the case to review it in terms of your trial preparation?

A. It was piecemeal. Mr. Feldman would give me copies of depositions of important witnesses and, you know, every week he was sending me over more depositions, discovery, witness statements and so forth?

Q. During the course of your trial preparation did you ever do a sentencing score sheet calculation for this case?

A. No.

Q. Can you tell the Court why not?

A. Well, two reasons: first, because it was not- - I was not responsible for that aspect of the case. And second, I wouldn't know how to do one really. I had been doing only capital litigations for over ten years and with capital cases you don't deal with sentencing (Page 10) guidelines. So in the event that I had a client who was found guilty of something less than first-degree murder then I would deal with the guidelines and basically whoever was the prosecutor would know how to do the guidelines and I just look them over. But I didn't have the kind of practice

where you're dealing with second-degree or third-degree felonies and people with prior records where I would - - you know, back when I was at the Public Defender's Office I used to do that, but the guidelines had changed significantly since I left the Public Defender's Office, so it wasn't something I was good at.

Q. Do you ever have occasion during the course of your trial preparation to explain to Mr. Guerra what his sentencing exposure was at trial?

A. No.

Q. Did you ever overhear anyone else have that kind of discussion during the pretrial stage with Mr. Guerra?

A. I know that it would sometimes come up collaterally while the three of us would be together for meetings.

THE COURT: The three of us being Mr. Feldman, yourself and Mr. Guerra?

A. Correct. We would be across the street at the Dade County Jail for meetings and my purpose would always

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there was any sentiment of surprise on either of their part?

MS. DENARO: Objection. It calls for speculation.

THE COURT: Sustained.

Q. BY MR. WAXMAN: Did you have any discussion or did you overhear any discussion about why they were distressed either Mr. Feldman or Mr. Guerra?

MS. DENARO: Objection, Judge, it would call for hearsay. They're both going to testify.

MR. WAXMAN: This is a Rule Three Hearing, Your Honor.

THE COURT: Is hearsay admissible in Rule Three?

MR. WAXMAN: Yes.

THE COURT: All right. Proceed.

THE WITNESS: They both seemed distressed by the fact that the top of the guidelines was thirty-four years. There was an element of surprise and I'm not sure, you know, I wasn't part of their discussion as to why it was a surprise. I don't know if it's because they were expecting that certain things wouldn't be factored in or what it was. But I know that there was a high level of distress and surprise.

Q. Were you surprised in any way?

THE COURT: What difference does that make?

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Q. And do you also do some civil work?

A. I do some civil work, yes.

Q. I mean just what's the general nature of your practice?

A. In terms of court appearances, I would say it's eighty to ninety percent criminal. I do federal and state criminal. I have cases all around the country. I did take over the practice from another civil attorney so I do have a lot of civil cases in the office. I have civil litigations, I haven't tried a civil trial in probably ten or twelve years. Those I refer out to other attorneys. As to trial work, it's actual litigation and trial work it's almost exclusively criminal.

Q. Okay. Do you recall when Mr. Guerra was arrested in this case?

A. Yes.

Q. Okay. And do you know when - - do you recall when it was, approximately?

A. He was arrested in June or July, I believe July 1999.

Q. Okay. And do you recall when you entered an appearance in this case relative to his arrest?

A. Almost immediately after that.

Q. Okay. And do you recall at that time or do you recall now when trial was?

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Q. And who between the two of you was primarily responsible for client relations?

A. I would say I was because I've known and represented Mr. Guerra for probably since the early eighties on different occasions.

Q. Okay. I want to direct your attention to the close of the State's case at trial and ask you whether or not there was a plea offer extended to Mr. Guerra by the State?

A. Yes, there was. The State closed in the late afternoon, I believe. We had a mini charge conference before adjourning that day, I believe. And I think we were supposed to begin the defense case the following morning. I believe it was the following morning, I don't think it was the night before from what I recall, I think the judge was calling his morning calendar, the family members of the victim who were present during the entire trial always sat outside. I was inside the courtroom. The defendant was at one point sitting in that far right chair in the back row. I believe Ms. Denaro came up to me, I think it was in the back of the courtroom or maybe just outside the door, and said that she had spoken to the family and would the defendant consider a

plea of ten years in state prison. And I remember asking her would that be to manslaughter and I don't know if we went back to *(Page 33)* the family and asked or she told me, yes. I went over and told the defendant what was going on. At some point Judge Ward came in, I don't know if she was here already, but I told her what was happening. This was almost near the end of, I believe, the Judge's morning calendar and I don't believe the jury - - the jury were in the back, they weren't here. At some point Judge Echarte asked us - - I don't know if he ever heard, he asked us to approach which we did. And I remember standing right here and either Ms. Denaro or Ms.Ward informed the Judge that there was a plea offer. The Judge inquired as to what. We told him ten years in state prison.

I specifically remember Judge Echarte stating that based upon what he's heard so far that would be the least the Court would accept as a plea. He would not accept a plea to anything less. We then went back. By this time Mr. Guerra, the defendant, was seated at the counsel's table. I don't recall where he was seated. I think I was, I was in the middle, Judge Ward was as you're looking to the right and he was seated to the left where he is now. We didn't have a lot of time to discuss the plea.

Q. When you say you didn't have a lot of time?

A. It was a matter of minutes. The Judge wanted a decision or, you know, the jury had been waiting in the *(Page 34)* back for awhile and he wanted to go on with the trial. I told the defendant, you know, he has to make up his mind now. He was torn, didn't know what to do. He did, I

specifically recall, he said what am I looking at if I continue with the trial? And I remember telling him twenty. I thought the Judge would give him twenty. If you want me to, I can explain how I honestly made that mistake.

Q. Yeah?

A. I've been involved in the case, the homicide happened in March of 1988, I got a call either that night or next day, I think first from a member from the defendant's family, but I did speak to him that weekend. I told him that, you know, he said, I think I shot a person and I told him, I said, if there was I'll find out on Monday.

Q. Let me just cut you off, I apologize?

A. Sure.

Q. Is there a specific reason, I mean you gave him a specific number, correct?

A. At some point during the case we had worked hard on the case. We felt we had a pretty decent self-defense case. At one point I scored the case out way before trial based upon the fact there had been plea negotiations, a plea proposal, or conversations would be a better word, between Ms. Denaro and myself. At one point was

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defense case that you and Mr. Guerra discussed this for the first time?

THE WITNESS: We never discussed the maximum that he was facing. I never did a score sheet to second-degree murder during the time I represented him.

THE COURT: Did you ever tell him what the charge of second-degree murder carried?

THE WITNESS: It carried a maximum of life.

THE COURT: Did you ever tell him that?

THE WITNESS: I believe I did tell him it carried a maximum of life, but I never told him what the score sheet - -

THE COURT: Did you ever discuss a score sheet with him?

THE WITNESS: Not until the time of sentencing.

THE COURT: So at the time that you mentioned that you thought he would be facing twenty years, you had never yet discussed the score sheet?

THE WITNESS: No, sir.

THE COURT: And prior to that moment you had old Mr. Guerra that the charges carried a maximum of life in prison?

THE WITNESS: At some point I think I did, yes, sir.

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A. Correct. And I think the fact that it was unsolicited and it was kind of a surprise that day - - I didn't think the state was - - once the trial started was when we were going to have plea negotiations.

Q. Do you think had the right plea offer been extended, had he appreciated his exposure at trial he would have been amenable to taking a plea in this case?

MS. DENARO: Objection, calls for speculation.

THE COURT: Sustained.

Q. BY MR. WAXMAN: Up until even the time of sentencing, in your mind, what was your understanding of what Mr. Guerra's sentencing exposure was, even as you came to court for sentencing?

A. I think both myself and Judge Ward made a comment we were surprised that it scored out to thirty-four plus years.

Q. Do you remember any reaction on the part of Mr. Guerra?

A. He was shocked to say the least. I remember him saying that he thought he was facing twenty years again at the day of sentencing to myself and Judge Ward.

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Q. Okay. When after sentencing did you next see or visit Mr. Guerra?

A. Either the same day or the next day.

Q. Okay. And did you have any discussion at that time regarding the sentencing?

A. He was obviously upset and he did state that he thought he wasn't facing that much time. He was surprised the score sheet came out as it did.

Q. And did something happen at that time with regard to your representation of him?

A. Shortly afterwards, cause they had severed the other charge, the firearm charge and that was still pending. Shortly afterwards, he discharged me as his attorney and, I believe, Judge Ward remained as his counsel.

Q. Okay. I want to direct your attention to closing argument in this case. Do you recall that? Ms. Ward gave the closing argument?

A. Yes, sir.

Q. Did you have a strategy either independently or with Ms. Ward regarding whether to withhold any objection to closing argument?

A. No.

Q. Would it have been your strategy to make every single objection that you deemed appropriate?

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A. It wasn't offered, I explained the context. You wanted to know if my client would accept it before you then went and presented it the family. So it was proposed, I guess is a better word.

Q. I assume that you spoke about that, obviously, with him?

A. Of course, it was not a firm offer.

Q. Okay. And what was his reasoning to you as to why it was that he was turning down seven, is it because he felt he had a great self-defense case?

A. He felt that we had a strong case, I'm sure.

Q. Okay. Well, I don't want you to guess. I mean, was the client's position that the reason why he was turning down ten then seven then a five plus five is because he had a good case?

A. You said the opposite order, it was five plus five, seven and then ten. He felt he had a good chance of winning, yes.

Q. Okay. And you and Ms. Ward also believed based on all the evidence that you guys had something to say, a colorful defense before the jury, did you not?

A. I believe so, yes.

Q. So it's fair to say that it was the client's informed decision to reject anywhere between five plus five up to ten; is that correct?

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that they were proposals, could you just clarify what that meant?

A. After a couple of the depositions, Ms. Denaro and I spoke about the case, the problem of the case both sides. The family was extremely concerned, obviously, about this case and were participating - - -

Q. If I - - -

A. I'm just saying, she didn't want to make a plea offer without, you know, she wanted to know if my client would accept the offer before she went - - to the proposal before she went and saw if the family would agree to it. So it was kind of a floating - - for lack of a better word. It wasn't a specific offer from the State like the ten years was 'cause that, I believe, came after she discussed with the family. It was what can we do to get rid of this case if I can get the family to agree to five years plus probation, would your client accept it? It was in that nature.

Q. And what's your best estimate about the amount of time what you spent discussing those proposals with Mr. Guerra?

A. It was a long time ago. I imagine one jail visit. I think the five and the seven were at the same time. It wasn't like five and I went back with seven. It was five with probation, I'm not sure of that.

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Q. Now, I know you're under oath here and I got to imagine you take that very seriously. Is your testimony as you're giving it today, influenced at all by the length of time that you've represented Mr. Guerra?

A. No.

Q. Is it influenced at all by the cases that Mr. Guerra referred you?

A. It was a long time ago, absolutely not.

Q. Do you recognize that what's at issue here has to do with your effectiveness as a criminal defense attorney?

Q. Absolutely. This is the first time I've been in this position.

A. And is this an easy or difficult thing - -

MS. DENARO: Objection, not relevant.

Q. BY MR. WAXMAN - - What you're doing here today?

THE COURT: Overruled.

THE WITNESS: May I, Judge?

THE COURT: Yes.

THE WITNESS: Yes, it's very difficult and my oath is important too, most important.

BY MR. WAXMAN:

Q. And do you feel at all that because of this mistake that you made, I got to understand that that's what it is, that that may have affected the result of this *(Page 75)* case for Mr. Guerra?

A. Yes. Specifically, the comments he made to me after sentencing.

Q. Other than what we've talked about here today?

A. He was surprised he was facing so much time.

Q. Well, tell me this, did he ever tell you after this that he would have accepted the ten years had he known his exposure was thirty-five?

A. I believe he did tell us that.

MR. WAXMAN: I have no further questions.

RECROSS-EXAMINATION

BY MS. DENARO:

Q. When did he tell you that?

A. After his sentence before he discharged me. It wasn't the same day, it was the next day. I believe I went and visited him.

Q. But he clearly told you - - we had many negotiations. You and I talked many times about trying to resolve this case?

MR. WAXMAN: Objection, Your Honor, we're just getting back to rehashing the cross.
THE COURT: Overruled.
THE WITNESS: Yes, we did.
BY MS. DENARO:

Q. And it wasn't just one time that you went and

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until the close of the State's case no further offers

Q. Before the close of the State's case, you have a recollection, as you sit here today, that he turned down five years followed by five; isn't that correct?
MR. WAXMAN: Objection, he stated that that was never a firm offer?
THE COURT: Overruled.

Q. BY MS. DENARO: The last question. When you had a conversation with your client that the prosecutor was considering offering him five plus five sentence, you spoke to him about that?

A. Yes, ma'am.

Q. And he told you when you made that proposal to him that he wasn't interested, correct?

A. Not that he wasn't interested, he wanted me to go back and see if we could work something out where he could stay in the county and not go into state prison system at that time.

Q. He never told you that he was going to take - - he didn't seem to think five years followed by five years was something he should do as evidenced by the fact that we didn't to it?

A. Correct.
MS. DENARO: Thank you.
THE COURT: Would you like to inquire? Anything

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if I remember correctly, was that he would accept a ten year plea, but he would not accept a day less due to what he had heard. He also instructed Ms. Denaro to conduct the plea negotiations and he took a break. When he came back, which was just as short as a break we just took right now, in the interim, Ms. Denaro approached the table and said what is it going to be, I have the family outside, I need to let them know what's going to happen, and she walked out.

I was sitting exactly where I'm sitting now and Mr. Feldman in the center, Judge Ward was sitting at the end. I looked at Rick and I asked him what do you think? Rick's words were what he told me all along that we have a winnable case. I asked Diane, Diane said something I really didn't hear what she said pretty well. At that time, I turned back to Rick and asked him what am I facing, you know, if I'm found guilty. He said you're looking at twenty years.

Ms. Denaro came back at the same time the Judge came back into the court. He asked, what happened. She said, you know, we couldn't reach a plea. He instructed Kessler, who was the bailiff then to bring the jury back. He told the jury that unfortunately there was, you know, they had not been able to take care, you know, take care of this and that the trial had to continue, the trial

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continued.

Q. How long did that entire course of event take?
A. God, you're talking about four years ago.
Q. Your best recollection?
A. I'd said seven, eight, ten minutes at the most.
Q. Okay. At the time that you - - first of all did you, at the time that you rejected the plea, what did you believe your worse case scenario was if you were convicted at trial?
A. Twenty years.
Q. Okay. Did you give any serious consideration to the plea?
A. To be quite honest with you things were happening so fast and I was very uncomfortable, nervous, stressed out and no I really didn't.
Q. Do you recognize - - this was in - - do you remember at what part of the trial this was?
A. This was after the State rested the following morning. The State rested in the afternoon, if I recall. The next morning I got here actually a little late. When I came in they sat me in the jury box and everything was running late that day. I went to the - - when I went to the table that's when it happened. So it was the following morning after the State rested.
Q. Why did you ask Mr. Feldman what you were

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I told him, again, what do you think? And he said, well, this is not on the table so I'm not holding any water to it, which is something you and I have discussed about the meaning of being on the table.
Q. Okay. So did you reject that proposal?
A. But there was never anything to reject. It wasn't a straight offer. Again it wasn't on the table.

Q. Okay. As you're sitting here today, had you known at the time of the plea offer was extended that you were facing thirty-five years, would you have favorably considered that plea offer?

A. I would have not ever exposed myself to 34.16 years in the state prison system.

Q. Now, Mr. Guerra, you testified at trial?

A. Yes.

Q. And you testified in an effect that this shooting was the result of either self-defense coupled with an accident, is that kind of what the testimony was about?

A. Yes, sir, I panicked.

Q. I'm just trying to draw your attention to that?

A. I was attacked.

Q. Did you believe that you were guilty of the offense charged?

A. No, sir.

Q. Okay. And would that have however affected your

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willingness to accept a plea in this case?

A. If I would have known that the honorable Pedro Echarte could have given me 34.16 years, we all would not be here today.

Q. Prior to that time that Mr. Feldman told you were looking at twenty years, had either of your attorneys ever told you that your exposure was greater than twenty years?

A. No.

Q. Well, but you did say that at some early time Mr. Feldman indicated you were facing a capital murder case; is that correct?

A. I was charged with first-degree murder.

Q. But there was no discussion at that time, he never told you - -

A. He mentioned to me that first-degree murder was a life felony.

Q. Other than that time during that period of time was there ever, did Mr. Feldman ever discuss with you the sentencing guidelines calculations in this case?

A. No, he never did.

Q. Did Judge Ward ever discuss with you the sentencing guidelines calculations in this case?

A. No, she didn't. She had very little exposure to his case. I spoke to Judge Ward for fifteen minutes.

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THE DEFENDANT: The day of sentencing.

THE COURT: Next question, counsel.

BY MR. WAXMAN:

Q. And did you study the document?

A. No.

Q. Okay. Did you have any discussion with either Mr. Feldman or Ms. Ward about it?

A. I told Ms. Ward that, you know, that these charges, you know, why are these charges on there they're very old. She noticed, she brought it - - -

Q. Let me interrupt you. I just want to hand you the sentencing score sheet from the record of appeal.

A. She note this down here.

Q. When you say this down here, what are you - - -

A. Those are my priors. And I asked her why were those on there, you know, these are very old. And she said, yeah wait a minute she went and handed it to Rick to Mr. Feldman. Mr. Feldman

took them to Ms. Denaro and I guess she was the one who wrote do not compute.

Q. Okay. Do you recall at the time you looked at that understanding what you faced, what sentence you faced on that day?

A. No, sir, because I had asked Mr. Feldman and my first question when I came into the courtroom was what I was getting. I was very anxious. I was very nervous and he *(Page 91)* said twenty.

Q. This was the morning of sentencing?

A. This was the morning of sentencing.

Q. Okay. When is the first time that you understood or you realized that either you were being sentenced close to thirty-five years or that possibility existed?

A. When the Judge passed sentence.

Q. Okay. And so obviously you indicated that was the first you heard of it. And how did that make you feel?

MS. DENARO: Objection, relevant.

THE COURT: What's the relevance?

MR. WAXMAN: It has to do with testimony regarding whether or not this was something he knew all along.

THE COURT: He said he didn't. What's the relevance of how he felt?

MR. WAXMAN: I'll go on to something different.

THE COURT: All right.

BY MR. WAXMAN:

Q. Did you express your reaction to anyone at that time?

A. Not at that time.

Q. Okay. Do you know that happened immediately - -

you are innocent of these charges?

A. If I would have known when you came to the table and you offered me the ten years that I was going to get 34.16 if I lost, I would have never gambled it.

THE COURT: You would have gambled for twenty?

MS. DENARO: That's my next question.

HE COURT: You would have gambled for twenty?

THE DEFENDANT: Yes.

THE COURT: Okay. Proceed.

MS. DENARO: Thank you.

BY MS. DENARO:

Q. Now you indicated on questioning from your lawyer that, in fact, Mr. Feldman went to see you in the jail to talk to you about various offers that were going back and forth between your attorney and I; do you remember that?

A. Please start again.

Q. Yes. Do you recall Mr. Feldman going to see you in jail, when we were trying to resolve the case, and telling you that seven years is going to be an offer. Do you recall that?

A. I remember Mr. Feldman coming only once to discuss that. He told me about the five years with ten probation that you had offered. He told me that he had countered the offer to you at that time for seven years *(Page 104)* straight. And then he also told me, when I asked him, well, what's going to happen? He said, don't give it much thought because this is not on the table, which is something that I always wanted to know what it means about being on the table.

Q. Your lawyer took the stand today and did not say that seven years and five years were not on the table? He did not testify to that.

A. He told me that offer was not on the table.

Q. Well, the truth of the matter is when he told you about the five years followed by the ten years, you didn't say get that for me because I want to take it, that's a good deal, did you?

A. He never said the ten years, and no, I never said that to him.

Q. So when Mr. Feldman was talking to you about possibly only five years of incarceration being offered by me, the prosecutor, you didn't say to him go run to Ms. Denaro and tell her I'm going to take that plea, make it happen?

A. He said to me that it wasn't on the table. I desisted. I asked him a couple of times if that was a good offer.

Q. What do you mean it wasn't on the table? He came to you and told you that he and I were talking about *(Page 105)* - - listen to my question first before you answer, he came to you and told you that we were in the process of talking about ten years - - five years in state prison followed by ten years probation. Did he not talk to you about that conversation that he had with me?

A. Yes.

Q. Okay?

A. But he never said that the offer - - I asked him. I asked him is this an offer and he continuously told me that is not on the table.

Q. Then what was he talking to you about it for, for his health?

A. I have no idea. You should ask him. Because he never told me that it was a firm offer. Had that been a firm offer, I would have taken it.

Q. How is it that you're going to say now that you would have taken it when you have said all along, emphatically, that I'm absolutely not guilty of these charges?

A. How many people come to this court and plead guilty that or not guilty.

Q. You never had and that's the point, remember telling the jury that?

A. I told the jury as I tell you today, that I don't feel that I'm guilty.

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THE COURT: With respect to Mr. Guerra's claim that the plea offer was improperly communicated to him because he was told that the most that he was facing was twenty years, I'm rejecting that claim. I find that Mr. Guerra's totally incredible. Once again I find his testimony to be incredible. That motion is denied in its entirety. Anything else?

MS. ZAHRALBAN: Yes, Judge, you have one other issue that we have not dealt with its claim Six. Counsel was ineffective for eliciting details of defendant's criminal history. If you recall - - -

THE COURT: Strategy. Strategy.

MS. ZAHRALBAN: Okay.

THE COURT: Anything else?

MR. WAXMAN: Nothing , Your Honor.

THE COURT: Please, prepare an order, show it to defense counsel and I'll enter the Order. Thank you, folks. And I'm sorry for the manner in which we had to conduct this hearing.

(Thereupon, the proceedings were concluded.)